Supreme Court, U.S.
FILED
JUN 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
and
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN H. CHEATHAM, III *
EDWARD B. MYERS,
Interstate Natural Gas Association
of America
1660 L Street, N.W.
Suite 601
Washington, D.C. 20036
(202) 293-5770

Attorneys for Petitioner
Interstate Natural Gas
Association of America

THOMAS F. RYAN, JR.*
ROBERT G. HARDY
JOHN W. EBERT
JENNIFER M. PORTER
ANDREWS & KURTH
1730 Pennsylvania Avenue, N.W.
Suite 700
Washington, D.C. 20006
(202) 662-2700

Attorneys for Petitioner
Transcontinental Gas
Pipe Line Corporation

* Counsel of Record

QUESTIONS PRESENTED

1. Whether the court of appeals decision that the Federal Energy Regulatory Commission had authority under the Independent Offices Appropriations Act to impose on interstate natural gas pipeline companies the fees set forth in Commission Order Nos. 361, 361-A and 395 was in direct contravention of this Court's decisions in *FPC v. New England Power Co.*, 415 U.S. 345 (1974) and *National Cable Television Ass'n Inc. v. United States* 415 U.S. 336 (1974).

2. Whether the court of appeals erred in permitting the Federal Energy Regulatory Commission to impose, on a piecemeal basis, fees that in totality appear to be designed to recover the full cost of regulation of the natural gas industry in a manner similar to the annual fee outlawed in *FPC v. New England Power Co.*, 415 U.S. 345 (1974).

3. Whether the court of appeals erred in holding that the Federal Energy Regulatory Commission provided legally sufficient substantiation of the costs upon which it based its fees and in upholding a "direct billing" procedure that provides no objective and defined bases for determining when and how the procedure should be applied, or once applied, whether it has been correctly applied.

PARTIES BELOW

Petitioners in this case, both of whom participated in the proceedings below, are the Interstate Natural Gas Association of America ("INGAA") and Transcontinental Gas Pipe Line Corporation ("Transco").

INGAA is a non-profit trade association whose membership is composed of virtually all the major natural gas pipeline companies subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act, 15 U.S.C. § 717 ("NGA").*

* INGAA's member companies are: Alabama-Tennessee Natural Gas Company, Algonquin Gas Transmission Company, Arkla Energy Resources, Inc., The Coastal Corporation, The Columbia Gas System, Inc., Consolidated Natural Gas Company, El Paso Natural Gas Company, Enron Corporation, Granite State Gas Transmission, Inc., Great Lakes Gas Transmission Company, KN Energy, Inc., Kentucky West Virginia Gas Company, Locust Ridge Gas Company, Michigan Gas Storage Company, MidCon Corporation, Mountain Fuel Resources, Inc., Northwest Energy Company, Pacific Gas Transmission Company, Pacific Interstate Transmission Company, Panhandle Eastern Corporation, Ringwood Gathering Company, Southern Natural Gas Company, Tennessee Gas Transmission Company, Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Texas Oil & Gas Corporation, Transcontinental Gas Pipe Line Corporation, Valero Interstate Transmission Company, Valley Gas Transmission, Inc.

Transco is a member of INGAA and a natural gas company subject to the jurisdiction of the Commission under the NGA.**

The other parties to the proceeding below, besides the respondent Federal Energy Regulatory Commission, were petitioners Phillips Petroleum Company and Phillips Oil Company.

** In addition to the companies listed in Transco's Docketing Statement filed with the Tenth Circuit, the following companies are affiliated with Transco: Transco Offshore Gathering Company (successor to Exchange Oil & Gas Corporation), Trans-Virginia Public Service Corporation (successor to Transco Finance Corporation), Transco Canada Corporation (successor to Transco Finance Company), Transco Energy Ventures Company (successor to Transco Development Company and Transco Energy Company), Transco Energy Investment Company, Transco Energy Marketing Company, Transco Exploration Partners, Ltd., Transco Gas Services Company, Inc., Transco Resources, Inc., Transeastern Gas Pipeline Company, Inc., Transmat Corporation, Transylvania Gas Pipeline Company, Inc., Petro Source Corporation, EAC, Inc., Elleron Chemicals Corporation, Petro Source Company, Petro Source Products Company, Petro Source Refining Corporation, Texon Corporation, Petrosource Transportation, Petro Source Resources, Petro Source Hydrocarbon Services, Petro Source Energy, Petro Source Oil Company, Northwest Pipeline Corp., Petro Source, Inc., Petro Source (The Partnership), Border Gas, Inc., Bell County Coal Corporation, Blue Crystal Coal Sales Co., Typo Mining, Inc., Valley View Coal, Inc., McCoy Elkhorn Coal Corporation, Beech Grove Processing Company, Inland Ports, Inc., Aceco, Inc., Aminex Coal Corporation, Aminex Coal Development Corporation, Bituminous-Laurel Mining, Inc., Johns Creek Elkhorn Coal Corporation, Transco Coal Services Company, Alpine Coal, Inc., Cross Mtn. Coal, Inc., Farmer Coal Company, Inc., Highland Coal, Inc., Interstate Coal Company, Inc., Kem Coal Company, Ken-Coal, Inc., Leeco, Inc., Mountain Clay, Inc., Randall Fuel Company, Inc., Stansbury & Company, Inc., New Brush Creek Mining, Inc., Polls Creek Coal Co., Inc., Pro-Land, Inc., The Twenty Two Sixty Five Corporation, Wildcat Coal Sales, Inc., Oswayo Mining, Inc., Sizemore Trucking, Inc., River Coal Company, Indian Head Mining Company, Morgan Coal Company, Alpha Coal Company, Inc. and Voyager Energy Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING WRIT	6
I. The Decision Of The Court Below Flouts The Intent Of Congress In Passing The Independent Offices Appropriation Act As Interpreted By This Court In *New England Power* And *National Cable*	6
II. The Court Below Erred In Upholding Fee Schedules That Arbitrarily And Capriciously Fail To Identify The Criteria On Which Fee Calculations Are Based	13
CONCLUSION	15
APPENDIX (Printed in a separate volume)	
Section A — Opinion of the United States Court of Appeals for the Tenth Circuit in *Phillips Petroleum Co., et al. v. FERC*	1a
Section B — Order No. 361, *FERC Statutes & Regulations* (CCH) ¶ 30,542 (1984)	1b
Section C — Order No. 361-A, 27 FERC ¶ 61,113 (1984)	1c
Section D — Order No. 395, *FERC Statutes & Regulations* (CCH) ¶ 30,592 (1984), *reh'g denied, id.*, ¶ 30,609 (1984)	1d
Section E — Independent Offices Appropriation Act, 31 U.S.C. § 483a (1970), *recodified* at 31 U.S.C. § 9701 (1982)	1e
Section F — Bureau of the Budget, Budget Circular No. A-25 (1959)	1f

TABLE OF AUTHORITIES

	Page
COURT DECISIONS	
Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378 (1959)	12
Electronic Industries Ass'n v. FCC, 554 F.2d 1109 (D.C. Cir. 1976)	6
FPC v. Hope Natural Gas, 320 U.S. 591 (1944)	12
FPC v. New England Power Co., 415 U.S. 345 (1974)	5, 6, 7, 8, 9, 10, 11, 13
Mississippi Power & Light Co. v. NRC, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980)	6
National Cable Television Ass'n v. FCC, 554 F.2d 1094 (D.C. Cir. 1976)	6, 8
National Cable Television Ass'n Inc. v. United States, 415 U.S. 336 (1974)	5, 6, 7, 8, 9, 12
Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983)	6
New England Power Co. v. FPC, 467 F.2d 425 (D.C. Cir. 1972), *aff'd* 415 U.S. 345 (1974)	7, 12, 13
ADMINISTRATIVE DECISIONS AND ORDERS	
Order No. 317, 35 FPC 30 (1966)	11
Order No. 427, 45 F.P.C. 440 (1971)	7, 12

	Page
STATUTES AND REGULATIONS	
Natural Gas Act of 1938, 15 U.S.C. § 717, *et seq*	12
28 U.S.C. § 1254(1)	2
Independent Offices Appropriation Act, 31 U.S.C. § 483a (1970), *recodified* at 31 U.S.C. § 9701 (1982)	*passim*
MISCELLANEOUS	
Bureau of the Budget Circular No. A-25 (September 23, 1959)	3, 7, 8, 11, 12
30 Fed. Reg. 12077 (1965)	12
47 Fed. Reg. 57943 (1982)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
and
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Interstate Natural Gas Association of America ("INGAA") and Transcontinental Gas Pipe Line Corporation ("Transco") hereby petition the Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on March 10, 1986 affirming Federal Energy Regulatory Commission ("Commission") Order No. 361, Fees Applicable to Natural Gas Pipeline Rate Matters (issued February 6, 1984), Order No. 361-A denying rehearing of Order No. 361 (issued April 20, 1984) and Order No. 395, General Activities Fee Rule (issued August 31, 1984), rehearing denied, October 31, 1984.[1] The Commission orders require natural gas pipeline companies subject to

[1] Petitioners challenge Order No. 395 only to the extent that it contains the same "direct billing" procedures as Order Nos. 361 and 361-A. Consequently, it is not, hereafter, separately referenced in this Petition.

the Commission's jurisdiction to pay for the various Commission activities specified in Order Nos. 361 and 361-A. Because of the nature of the charges sought to be imposed, this proceeding will decide the broad question of whether and to what extent regulated companies should be required to bear the financial burden of regulation undertaken in the public interest.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in *Phillips Petroleum Co., et al. v. FERC,* 786 F.2d 370 (10th Cir. 1986); a copy of that decision is contained in the Appendix at Section A. The Commission's Order No. 361 is reported at FERC Statutes & Regulations (CCH) ¶ 30,542 (1984) and Order No. 361-A denying rehearing of Order No. 361 at 27 FERC ¶ 61,113; Order No. 395 is reported at FERC Statutes & Regulations (CCH) ¶ 30,592 (1984), rehearing denied, *id.*, ¶ 30,609 (1984). These orders are contained in the Appendix at Sections B, C and D respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1986 and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute upon which the court of appeals decision is based is the Independent Offices Appropriation Act, 31 U.S.C. § 483a (1970), *recodified* at 31 U.S.C. § 9701 (1982) ("IOAA"), the relevant portions of which are contained in the Appendix at Section E.

STATEMENT OF THE CASE

This case involves the authority of the Federal Energy Regulatory Commission under Title V of the IOAA to levy charges for performing regulatory duties under the Natural Gas Act, which duties Congress expressly imposed on the Commission to protect the public interest in having access to natural gas at just and reasonable rates.

Background

On March 10, 1986, in *Phillips Petroleum Co., et al. v. FERC,* 786 F.2d 370 (10th Cir.) (*"Phillips Petroleum"*), the court below upheld Commission Order Nos. 361 and 361-A against challenge by INGAA and Transco. These Orders had their genesis in a Notice of Proposed Rulemaking ("NOPR") issued on December 15, 1982 (Docket No. RM83-2-000). In the NOPR, the Commission presented a portion of what it claimed would be a comprehensive proposal to establish fees designed to reimburse the Commission for essentially all of the costs incurred in performing its regulatory responsibilities pursuant to the statutes and regulations governing its activities.[2] In particular, the NOPR contained a proposal to establish fees to reimburse the Commission for the costs—both direct and indirect—incurred in carrying out its rate regulation responsibilities under the NGA. Citing Title V of the IOAA and Bureau of the Budget Circular A-25, issued September 23, 1959, as authority for its proposed charges, the Commission made the following as its only explanation for the proposed charges:

> *With respect to each of the above services,* [associated with the processing of pipeline rate filings], *the Commission believes that each identifiable applicant for these kinds of Commission services derives more*

[2] In addition to establishing fees applicable to natural gas pipeline rate filings in Order Nos. 361 and 361-A, the Commission established fees applicable to producer matters under the NGA in Order Nos. 360 and 360-A. Phillips Petroleum Company and Phillips Oil Company, the other parties to the proceeding below, petitioned the court of appeals for review of Order Nos. 360 and 360-A (Case No. 84-1840) and the petition brought by Transco and INGAA was consolidated in the Phillips proceeding.

> *substantial benefits than those benefits accruing to the general public.* They are, therefore, the recipients of special benefits from the Commission. The Commission proposes to assess against any individual or entity seeking these services, a fee designed to recover the costs associated with providing that service.

47 Fed. Reg. 57943, 57945 (1982). (emphasis supplied.)

Following the submission of written comments by joint petitioners individually and by other interested members of the natural gas industry, the Commission issued Order No. 361. By its Order, the Commission established fees and billing procedures for filings involving, among other things, general changes in rates and cost adjustments. In addition, the Commission reserved the "option" of ordering "direct billing" to recover its claimed costs of processing any tariff filing which the Commission might deem to be "an extraordinary filing." Under this procedure, the Commission has discretion not to apply the established set charge but to periodically bill the entity that submitted the filing for all costs incurred in processing the filing.

On March 7, 1984, INGAA and Transco individually petitioned the Commission for rehearing of Order No. 361 claiming that the Commission lacked the authority to impose charges designed to reimburse it for its cost in regulating natural gas pipeline rates. INGAA and Transco do not and did not challenge the Commission's authority to establish *any* fee; they challenged primarily the Commission's authority to establish fees rendered for services performed pursuant to the Commission's authority under Section 4 of the NGA to regulate prices charged by the pipelines. Section 4 of the NGA requires that rates charged by pipelines should be just and reasonable. Pipelines desirous of changing their rates to pass-through increased costs may do so only with the Commission's approval.

In their petition for rehearing before the Commission, INGAA and Transco contended that no "special benefit" (a benefit accruing to the pipelines above and beyond the benefit bestowed on the public), which is required to justify the

imposition of a fee, was conferred on natural gas pipelines as a result of Commission rate regulation. Both of the joint petitioners further urged that the Commission's reservation of an "optional" direct billing procedure was vague, subjective and open-ended and, therefore, inconsistent with the IOAA and established precedent for the imposition of a valid fee structure. Finally, Petitioners showed that the Commission failed to provide data to support the costs claimed as the basis for the pipeline tariff filing fees.

On April 20, 1984, the Commission issued Order No. 361-A denying rehearing. The Commission dismissed the argument that the Commission's regulation of pipelines' rates was undertaken primarily for the benefit of the general public and conferred no "special benefit" on natural gas pipelines. Instead, the Commission stood by its conclusory statement in Order No. 361, wherein it merely asserted that its rate review functions were undertaken for the benefit of the pipelines. Likewise, the Commission rejected the Petitioners' arguments that the "optional" direct billing procedure was unlawful. According to the Commission, the procedure was not impermissibly vague because direct billing would be used "infrequently" in the pipeline rate area and, therefore, it was unnecessary to devise a generic formula for apportioning direct billing costs among parties to a rate proceeding. Finally, the Commission then concluded that its explanation in Order No. 361 of the cost basis of the fees prescribed therein was sufficiently detailed.

After timely petitions for review by INGAA and Transco in the United States Courts of Appeals for the District of Columbia Circuit and the Fifth Circuit respectively, the appeals were consolidated in the Tenth Circuit with the Phillips Petroleum Company and Phillips Oil Company appeal of fee orders relating to natural gas producers.

The court of appeals rejected Petitioners' contentions that the IOAA and the decisions of this court in *FPC v. New England Power Co.*, 415 U.S. 345 (1974) and *National Cable Television Ass'n Inc. v. United States* 415 U.S. 336 (1974) required that the Orders Nos. 361 and 361-A be vacated as beyond the statutory authority conferred on the Commission by IOAA.

The court determined that later court of appeals decisions in *National Cable Television Ass'n v. FCC,* 554 F.2d 1094 (D.C. Cir. 1976), *Electronic Industries Ass'n v. FCC,* 554 F.2d 1109 (D.C. Cir. 1976), *Mississippi Power & Light Co. v. NRC,* 601 F.2d 223 (5th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980) and *Nevada Power Co. v. Watt,* 711 F.2d 913 (10th Cir. 1983), disposed of the question of whether FERC was bestowing a "special benefit" on the Petitioners in the circumstances presented by Commission Order Nos. 361 and 361-A. The court rejected Petitioners' contention that they received no special benefit, stating simply that the NGA under which they are regulated was passed specifically to constrict pipeline earnings and prevent pipelines from using their monopoly position. The court opined that the fees imposed were for services that permitted the regulated companies to engage in their respective activities or to comply with the NGA and that they were, therefore, permissible. *Phillips Petroleum,* Appendix, Section A at 13a. The court similarly rejected Petitioners' contention that the Commission had failed to substantiate the cost basis underlying its fees and that direct billing constituted an uncontrolled and standardless reach by the agency into the corporate treasury.

REASONS FOR GRANTING WRIT

I

THE DECISION OF THE COURT BELOW FLOUTS THE INTENT OF CONGRESS IN PASSING THE INDEPENDENT OFFICES APPROPRIATIONS ACT AS INTERPRETED BY THS COURT IN *NEW ENGLAND POWER* AND *NATIONAL CABLE*

This Court's decisions in *FPC v. New England Power Co.,* 415 U.S. 345 (1974) ("New England Power") and *National Cable Television Ass'n Inc. v. United States* 415 U.S. 336 (1974) ("National Cable") define the characteristics of a fee authorized by the IOAA. *New England Power* affirmed the judgment of the Court of Appeals for the District of Columbia Circuit which set aside Commission Order No. 427 of the Federal Power Commission, the predecessor of the respondent

Commission, 45 F.P.C. 440 (1971). The vacated Commission order sought to establish annual fees, levied on all regulated companies, to reimburse the Commission for those costs of regulating the natural gas pipeline industry not met by licensing fees. The court of appeals found that the Commission's regulation of the natural gas industry, in particular its rate regulation functions, did not confer a "special benefit" upon an identifiable recipient and that the annual fee was therefore unlawful. *New England Power Co. v. FPC*, 467 F.2d 425, 429 (D.C. Cir. 1972).

In affirming the court of appeal's decision in *New England Power Co., supra,* this Court held that the IOAA authorizes the imposition of a fee, not a revenue raising tax. It endorsed Budget Circular No. A-25 (Appendix, Section F) issued by the then Bureau of the Budget as the "proper construction of the Act" (*New England Power,* 415 U.S. at 352), and held that an impost is a fee only if there is an identifiable special service rendered and a recipient fee payor that receives a special benefit. The contemporaneous *National Cable* decision further defined a fee as:

> incident to a voluntary act, *e.g.,* a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.

National Cable, 415 U.S. at 340-41.

In *National Cable,* the Court was again concerned that the agency, in that instance the Federal Communications Commission ("FCC"), had imposed a fee that was aimed at raising revenue rather than providing a special benefit. The FCC calculated its fee to recoup all its regulatory costs.[3] *Id.* at 341.

[3] It took the total cost of operating the pertinent agency divisions, subtracted out other fees paid and prorated the remainder over the number of subscribers serviced by the regulated entity. The FCC determined that the prorated amount approximated the value to the recipient of the FCC's oversight activities.

The Court analyzed how the IOAA requirement that public policy be taken into consideration could be used to impose higher fees. To guard against this, it determined that fees could not exceed the value of the service to the recipient. The Court thus determined the measure of the maximum fee that can be imposed to assure against unlawful agency revenue raising. In this context, however, the Court noted:

> If assessments are made .... which are sufficient to recoup costs to the Commission, [the regulated entities] ... would be paying not only for the benefits they received but for the protective services rendered the public by the Commission.

The Court did not say that public benefit considerations could be read out of the Act. To the contrary, it was concerned that a proper balance should be struck, and that the agency remove from its fees costs attributable to servicing the public interest.

> It is not enough to figure the total cost ... for operating a unit of supervision and then to contrive a formula that reimburses the Commission for that amount. Certainly, some of the costs inured to the benefit of the public, unless the entire regulatory scheme is a failure, which we refuse to assume.

Id. at 343.

The fees established by the Commission's Order Nos. 361 and 361-A are claimed by the Commission to be designed to reimburse it for costs associated with its responsibilities to regulate the rates of pipelines under the NGA. Therefore, under the standards of the IOAA as interpreted by Budget Circular No. 25-A and interpreted by this Court in *New England Power* and *National Cable,* the Commission must establish that these rate regulation responsibilities confer "specific benefits" upon the regulated companies and are not primarily designed to benefit the public.

The fee scheme installed by Order Nos. 361 and 361-A and endorsed by the court below, far from meeting these requirements, turns *New England Power* and *National Cable*

upside down and obliterates this Court's carefully drawn distinction between public and private benefits. In a thinly veiled effort to comply with *New England Power,* the orders merely assert that there are individual benefits to individual participants in the regulatory scheme. These benefits are neither specified nor quantified. Instead, the Commission simply imposed its full cost of regulation on the regulated entities by the simple expedient of manipulating the "benefit" requirement.

The Commission's fee schedule rests on the claim that *all* the Commission's regulatory activities are of "special benefit" to the regulated because the Commission is assisting regulated companies to comply with the law. The Commission, in essence, is insisting that its statutory functions have a value independent of the type of regulatory activity undertaken—that controlling a pipeline's revenues and earnings is in the same class as granting a permit to build a pipeline or a house, or to practice medicine. The assertion rests on a subjective, standardless and shifting assessment of benefit that makes a mockery of the strict limits of the IOAA and this Court's decisions. It also ignores the public interest factor analyzed in *National Cable* and has all the characteristics of revenue raising that this Court sought to guard against in *National Cable.* If all regulatory activities bestow special benefits because of the fact of regulation, there is no practical limit to the fees that can be imposed; the agency may expand its activities and staff without regard to necessity or expense, provided only that its 'fee' income matches expenses.

The most obvious flaw in the decision of the court below is that the IOAA was not intended as an infinitely elastic answer to changing regulatory fashions. On its face and by intent the Act does not countenance the charges at issue in Order Nos. 361 and 361-A. The IOAA enumerates the specific and discrete types of service for which fees could be charged because, as the legislative history of the IOAA makes clear, Congress recognized the complexities of framing one statute universally applicable to the diverse activities of all federal agencies. The list represented the activities common to all agencies for which it was agreed there should be charges pending passage of individual acts addressing the unique regulatory circumstances of each

agency. It was not intended to be all encompassing and, as the list makes clear, was intended to cover only traditionally defined benefits and privileges. That the IOAA remains over 30 years after its passage the sole source of authority for the imposition of fees on the Commission's regulatory activities under the NGA, does not confer on the Commission the right to expand the Act's scope. That is clearly a legislative function. The Commission cannot by fiat change the original intent of the IOAA to conform to a recently conceived notion of what expenses it believes should be borne by regulated companies. The fees imposed by Order Nos. 361 and 361-A are not of the character prescribed by the clear statutory language. They require regulated companies to pay the Commission for reducing their rates, revenues and earnings, a function which bears no resemblance to the license, permit, privilege or other similar thing specified in the IOAA. The contested orders, thus, represent nothing less than an attempt by the Commission to shift onto regulated companies the cost of performing basic and inherently public benefit functions not covered by the IOAA.

That the IOAA was not intended to cover the consumer protection function perfomed by the Commission in determining that pipeline rates are just and reasonable is borne out by the legislative history of the IOAA. The legislative history of the Act is not extensive. It is fully discussed in the concurring opinion of Justices Marshall and Brennan in *New England Power* and will not be repeated here. *See New England Power,* 415 U.S. at 1157-58. The concurring opinion concluded that the legislative history is sufficient to make clear that fees may be charged only to special beneficiaries and not to recoup the agency's regulatory costs generally. Specifically, it concluded that:

> [I]t [the IOAA] contemplated imposition of application fees, registration fees, fees for grants of licenses, permits or other similar authorizations. This interpretation is consistent with the statutory language with its long enumeration of specific, readily identifiable, and discrete Commission actions for which fees can be charged.
>
> * * *

> [N]othing in the legislative history suggests a broader definition of benefit under the Act. On the contrary, since the broader view that the full cost of regulation should be assessed those subject to the agency's jurisdiction in the absence of a 'special benefit' would have represented a controversial policy choice, . . . the very lack of debate . . . and the ease with which it passed compel the more limited interpretation.

New England Power, 415 U.S at 356-57 (concurring opinion of Marshall J. and Brennan J.)

The IOAA authorizes the assessment of fees only in connection with services rendered by the government above and beyond the service or benefit regularly received by the public at large. The power thus vested in the Commission by Title V of the IOAA is clearly limited and did not include authority to impose fees for the performance of regulatory functions of a nonlicensing character.

The administrative interpretation of the Act, set forth in Budget Circular No. A-25, (Appendix, Section F), and endorsed by this Court in *New England Power,* similarly construes the powers granted by the IOAA as limited. The circular tracks the statutory language and follows the legislative history in focussing on activities of a traditional licensing character. Significantly, the circular is silent on rate regulation.

Moreover, the Commission has previously acknowledged its lack of authority to assess the type of fees or charges at issue here. It recognized that the provision of services to assist regulated companies to comply with the law did not afford an independent basis on which to levy fees and that it could not be bootstrapped into an authority to levy fees not specified in the IOAA. In its notice of rulemaking which culminated in the promulgation of Order No. 317, 35 FPC 30 (1966), which established fees primarily in connection with the filing of pipeline certificate applications, the Commisssion stated:

> The assessment of user charges or other fees with respect to the exercise of *our regulatory activities under . . . the general rate and accounting provisions*

> *of the Natural Gas Act* would not be appropriate since these activities *are primarily for the benefit of the general public rather than the regulated companies.*

30 Fed. Reg. 12077 (1965) (emphasis supplied).

The language of the statute, its legislative and administrative history and interpretation, and previous judgments by the Commission about the illegality of imposing the fees at issue here demonstrate that the court below erred in failing to vacate the fees as requested by Petitioners herein and in doing so violated the IOAA.

National Cable points up another significant defect in the lower court's analysis—the failure to give proper weight to the public interest. The Commission declared, and the court below affirmed, that the public interest in the NGA is merely incidental to the regulatory benefits. Designating that interest as incidental was a prelude to ignoring it. The significance of that public interest, however, is enshrined in the statute itself and is acknowledged in *National Cable* and must be accommodated as intended by the IOAA. As Budget Circular No. A-25 makes clear, where the public interest is predominant, a fee may not be charged.

When Congress enacted the NGA, it declared the business of transportation and sale of natural gas in interstate commerce to be "affected with a public interest" which required regulation to protect that interest. 15 U.S.C. 717(c). This Court endorsed that concept in *FPC v. Hope Natural Gas,* 320 U.S. 591, 610 (1944), namely that the NGA was enacted to address the "specific evils" uncovered by the Federal Trade Commission and the provisions authorizing the Commission to fix "just and reasonable rates" were designed clearly "to protect the consumer interests against exploitation at the hands of natural gas companies." 320 U.S. at 610. *See also Atlantic Refining Co. v. Public Service Commission,* 360 U.S. 378 (1959).

Pertinent to the precise circumstances at issue here, the Court of Appeals for the District of Columbia Circuit, in striking down the Federal Power Commission's annual fees in

its Order No. 427, in *New England Power Co. v. FPC*, 467 F.2d 425 (D.C. Cir. 1972), *aff'd, New England Power*, 415 U.S. 345 (1974), found the primary purpose of the Commission's responsibilities under the NGA is to protect the general public. In fact, the court of appeals specifically dismissed Commission arguments that it would lawfully recover its costs associated with its NGA regulatory responsibilities based on its finding that:

> [T]he regulation of these industries is primarily for the benefit of the public. Their charter statutes require them to so act. The courts have so held. There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public. In the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. We are well aware of the burgeoning administrative expense of operating the Government, however, only Congress can give authority to levy these fees. It has not done so here.

467 F.2d at 429 (footnote omitted).

Because the Commission's rate regulatory functions are undertaken for the purposes specified in the NGA, the ultimate beneficiary of the Commission's regulatory activities under Section 4 of the NGA is the general public and not the natural gas pipelines that make rate filings. The imposition of fees is, therefore, unlawful.

II

THE COURT BELOW ERRED IN UPHOLDING FEE SCHEDULES THAT ARBITRARILY AND CAPRICIOUSLY FAIL TO IDENTIFY THE CRITERIA ON WHICH FEE CALCULATIONS ARE BASED

The court below erred in giving unquestioning deference to an arbitrary and capricious Commission explanation of the

basis on which it calculated its fees. The court accepted without inquiry an "explanation" of the fees and the calculations underlying them that fails absolutely to provide the regulated companies with any means of evaluating the Commission's conclusions and methodology. Consequently, regulated companies are left to assume that the agency has acted properly. The law prohibits the Commission from leaving regulated entities to such thin protection against abuse.

With respect to the direct billing procedure initiated by Order Nos. 361 and 361-A, the Commission has failed to specify the standards for determining when a rate filing is "extraordinary" or "not average." Similarly, the Commission has failed to state the standard or cost basis on which such a fee would be calculated. In essence, the Commission has reserved to itself the right to require regulated companies to deliver themselves into the Commission's hands on the basis of blind faith. The companies, therefore, are vulnerable to agency notions of complexity which are not predictable or comprehensible by any objective standard. The pervasive vagueness surrounding the purpose and application of this procedure renders it unlawfully arbitrary and capricious.

CONCLUSION

The court below has succeeded in rendering meaningless this Court's careful delineation of special and public benefits under the IOAA. It has bestowed upon the Commission a financial independence in which the only practical control over the agency's collection of revenue is the size of the agency's operation—which in itself, absent the restraint imposed by the usual Congressional budgetary controls, may prove to be highly expansionary. The IOAA was not intended as a vehicle by which Congress would abdicate responsibility for controlling the basic costs of funding governmental operations, or as a vehicle to finance all government operations—under the impact of the decision at issue here, that outcome is now sanctioned.

FOR THE FOREGOING REASONS, the petition for a writ of certiorari should be granted.

Respectfully submitted,

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

John H. Cheatham, III
Edward B. Myers
Interstate Natural Gas Association of America
1660 L Street, N.W.
Suite 601
Washington, D.C. 20036

Attorneys for Interstate Natural Gas Association of America

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Thomas F. Ryan, Jr.
Robert G. Hardy
John W. Ebert
Jennifer M. Porter
Andrews & Kurth
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Transcontinental Gas Pipe Line Corporation